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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL VASQUEZ,

Defendant and Appellant.

D073703

(Super. Ct. No. SCS266196)

APPEAL from an order of the Superior Court of San Diego County,  
Theodore M. Weathers, Judge. Affirmed in part; reversed in part. Remanded with  
directions.

Sheila O'Connor, by appointment of the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M.  
Clark, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael Vasquez pled guilty to two counts of lewd or lascivious acts on his two minor stepdaughters and was sentenced to 10 years of total prison time. The court also imposed a 10 year criminal protective order pursuant to Penal Code section 136.2, subdivision (i)<sup>1</sup>, to protect the two victims as well as their mother, Vasquez's ex-wife Patricia J.<sup>2</sup> Vasquez appeals from the protective order and challenges the inclusion of Patricia J. on the grounds that she was not a victim and therefore the court lacked the authority to issue a criminal protective order as to her. The People argue that Vasquez forfeited his challenge by failing to object at the sentencing hearing; if the challenge was not forfeited, they defend the protective order by asserting that substantial evidence supports a finding that Patricia J. was a victim of extortion or attempted extortion.

Having reviewed the record and applicable law, we agree with Vasquez that the order should be modified to strike Patricia J. from the list of protected persons. At sentencing, Vasquez did not have a meaningful opportunity to object because a reasonable individual under the circumstances would not have been aware that Patricia J. might be among the class of victims protected by the order, and insufficient evidence supports finding that she was a victim of any crime. Accordingly, we reverse and remand the matter to the trial court to strike Patricia J. from the protective order.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> We refer to this individual by her first name and last initial, intending no disrespect.

## FACTUAL AND PROCEDURAL BACKGROUND

Vasquez sexually abused his two minor stepdaughters on several occasions. At some point, the primary victim became concerned that Vasquez would report their mother, Patricia J., to immigration authorities because he had threatened to do so during a heated series of arguments. The arguments stemmed, at least in part, from Patricia J.'s refusal to allow Vasquez's daughter to live with them. Fearing that her mother would be deported, the victim threatened Vasquez with disclosure of his abuse if he contacted immigration authorities—and then disclosed the abuse to her mother anyway.

In 2015, a jury found Vasquez guilty of eight counts of lewd or lascivious acts upon a child (§ 288, subd. (a)), but this court later reversed the judgment. (*People v. Vasquez* (Aug. 29, 2017, D069298) [nonpub. opn.].) In January 2018, Vasquez pled guilty to two counts of lewd or lascivious acts upon a child and was sentenced to a total prison term of 10 years. He stipulated that the preliminary hearing transcript would form the factual basis for his plea. The court also imposed a 10-year criminal protective order as to the two minor victims and their mother, Patricia J.

## DISCUSSION

### A. *Vasquez Did Not Forfeit His Claim.*

Both parties agree that Vasquez failed to object to the issuance of the criminal protective order at the sentencing hearing. Vasquez frames his challenge as one of authority, arguing that the court was not authorized to issue the order as to Patricia J.

because the evidence failed to show she was a victim. In response, the People argue that "the evidence showed she was a victim of a crime."

The parties' arguments put the cart before the horse. Irrespective of whether the order was properly authorized, a reasonable individual under these circumstances could have been unaware that Patricia J. was intended to be a protected party for purposes of the criminal protective order. Before the court issued the order, whenever the three individuals protected by the criminal protective order were discussed—in the probation reports, by the prosecutor, and by defense counsel—they were consistently referred to as "the victims and their mother." When the court entertained the criminal protective order at the sentencing hearing, the court used the term "victims" and did not identify any individuals by name. Patricia J. was never discussed as a potential victim in that colloquy or any other point. And as we discuss below, only the barest evidence of any crime against Patricia J. was adduced at the preliminary hearing, which Vasquez stipulated would provide the factual basis for his plea. We note that a prior criminal protective order, issued in 2015, included Patricia J. as a protected party. Apart from this, however, the record offers no reason for Vasquez to have known at his January 2018 hearing that when anyone mentioned a protective order in favor of the "victims," they meant to include the mother, Patricia J. On these facts, Vasquez was never provided a meaningful opportunity to object. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887 fn. 7.)

B. *Insufficient Evidence Supports Finding that Patricia J. Was a Victim of a Crime.*

Under section 136.2, subdivision (i), in certain types of criminal cases courts may issue criminal protective orders to restrain defendants from contacting victims as well as

witnesses that have been harassed. Subdivision (i)(1) enables the court to issue a criminal protective order, for up to 10 years, restraining the defendant "from any contact with a victim of the crime." The subdivision further notes the Legislature's intent that the court base the duration of the order on "the seriousness of the facts before the court, the probability of future violations, and the safety of a victim and his or her immediate family." (*Ibid.*)

The standard for whether an individual is a victim for the purposes of a criminal protective order is broad. Victim is defined in section 136, subdivision (3), as "*any natural person* with respect to whom there is reason to believe that *any crime* as defined under the laws of this state or any other state or of the United States *is being or has been perpetrated or attempted to be perpetrated.*" (*Ibid.*, italics added; see also *People v. Beckemeyer* (2015) 238 Cal.App.4th 461, 465; *People v. Race* (2017) 18 Cal.App.5th 211, 219 [the term victim "must be construed broadly to include any individual against whom there is 'some evidence' from which the court could find the defendant had committed or attempted to commit some harm"].) A court may consider all competent evidence before it in determining whether to issue a criminal protective order pursuant to section 136.2. (*Race*, at p. 220.)

The People argue that Patricia J. was properly considered a "victim" for the purposes of section 136.2 because testimony at the preliminary hearing amounted to substantial evidence that Vasquez committed or attempted to commit extortion against Patricia J. They do not attempt to justify the order as to Patricia J. under any other basis provided by section 136.2. According to the People, testimony at the preliminary hearing

revealed that Vasquez and Patricia J. "got into an argument about [Vasquez's] daughter, Brandy, moving in with them because Patricia J. did not want [her] to live there. During that argument, [Vasquez] threatened to have Patricia J. deported." The People do not provide any other information regarding the alleged extortion.

Section 136.2, subdivision (i)(1)'s reference to a restraining order protecting a victim of "the crime" may suggest it is referring to the crime of which the defendant was convicted. Here, Patricia J. was not a victim of any violation of section 288, subdivision (a). In any event, despite the otherwise broad statutory standard, the record shows, at best, mere speculation about extortion or any other crime committed against Patricia J. (See § 518.) The key threat relevant to this case, in fact, comes not from Vasquez but from the primary victim, Patricia J.'s daughter. She "blackmailed [Vasquez] and told him, 'If you tell—if you report my Mom, I'm going to tell people what you did to me.' " The victim's threat to disclose Vasquez's abuse was the result of fear caused by an earlier threat, Vasquez's threat to report Patricia J. to immigration authorities. At the preliminary hearing, this victim testified that before they split up, Vasquez and Patricia J. had an argument that included his threatening her deportation, which caused Patricia J. to become upset and cry. She also testified that part of the argument concerned Vasquez's daughter's moving into their home, to which Patricia J. was opposed.

But either actual or attempted extortion requires more than a mere threat. (See § 518; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789.) Extortion is "the obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under

color of official right." (§ 518, subd. (a).) Accordingly, absent any evidence of Vasquez seeking to obtain property or other consideration by means of his threat, and in light of the People's silence on this point, we conclude that insufficient evidence supports finding that Patricia J. was a victim of any crime.

#### DISPOSITION

The order is reversed, and the matter is remanded to the trial court to enter a new criminal protective order striking Patricia J. as a protected person. In all other respects the judgment is affirmed.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.